90-90 (1)

No. _____

IN THE

Supreme Court of the United States

October Term, 1990

MARTIN J. HUGHES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

CATHERINE M. BALLARD
Counsel of Record
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
Counsel for Petitioner

Of Counsel:

PERCY SQUIRE
BRICKER & ECKLER
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

1. Whether the lower courts improperly interpreted the standard to be applied in determining whether a trial judge should recuse herself pursuant to 28 U.S.C. §455(a).

2. Whether the Court of Appeals' holding that the mere request by the government for information is sufficient to render such information "material" for purposes of 18 U.S.C. §1001 is an overly broad interpretation of the statute rendering it violative of the defendant's rights under the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Constitution:

No. _____

IN THE

Supreme Court of the United States

October Term, 1990

MARTIN J. HUGHES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Petitioner, Martin J. Hughes, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 4, 1990 (motion for rehearing denied May 21, 1990).

OPINIONS BELOW

The following court rulings are found in the Appendix:

1. Memorandum and Order of the United States District Court for the Northern District of Ohio dated July 25, 1986;

2. Memorandum and Order of the United States District Court for the Northern District of Ohio dated October 20, 1986;

3. Memorandum and Order of the United States District Court for the Northern District of Ohio dated November 13, 1987;

4. Order of the United States Court of Appeals for the Sixth Circuit denying defendant's petition for writ of mandamus and motion for stay dated November 21, 1986;

5. Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit dated April 4, 1990 (reported as *Hughes v. United States*, 899 F.2d 1495 (6th Cir. 1990);

6. Order of the United States Court of Appeals for the Sixth Circuit denying defendant's motion for rehearing dated May 21, 1990; and

7. Order of the United States Court of Appeals for the Sixth Circuit granting motion to stay issuance of mandate pending application to the United States Supreme Court for writ of certiorari dated June 12, 1990.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 4, 1990. Petitioner sought a rehearing which was denied by the Sixth Circuit on May 21, 1990. Petitioner then filed a motion for a stay of mandate pending the filing of a Petition for a Writ of Certiorari with the United States Supreme Court. The motion was granted by order dated June 12, 1990. This petition has been filed within ninety days of the decision denying petitioner's motion for rehearing and within thirty days of the order granting a stay. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The first question presented raises a statutory issue regarding the interpretation of the reasonable person standard applicable to recusal motions under 28 U.S.C. §455(a): "Any ... judge ... shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." App. at A50.

CONSTITUTIONAL PROVISION INVOLVED

The second question presented raises a constitutional issue under the Due Process Clause, Fifth Amendment of the United States Constitution: "No person shall be ... deprived of life, liberty, or property, without due process of law." App. at A49.

STATEMENT OF THE CASE

On May 6, 1986, the grand jury issued a thirty-seven count indictment against petitioner Martin J. Hughes ("Hughes") who, at that time, was the international vice-president of District 4 of the Communications Workers of America ("CWA"). The indictment alleged that Mr. Hughes had (1) submitted to the CWA International office expense vouchers that falsely claimed reimbursement for mileage and meal expenses for union employees, and (2) received reimbursement funds from the CWA International which were used to make political contributions and to pay salaries at the United Telephone Credit Union.

Specifically, Mr. Hughes was charged with mail fraud in Counts 1 through 6 and Counts 19 through 23 in violation of 18 U.S.C. §1341; with embezzlement in Counts 24 through 28 in violation of 29 U.S.C. §501(c); with falsification of union records in Counts 29 through 32 in violation of 29 U.S.C. §439(c); with aiding and assisting in the filing of false W-2 and W-3 forms to the Internal Revenue Service in Counts 33 through 35 in violation of 26 U.S.C. §7206(2); and with making false statements to the United States through the submission of false labor reporting documents in Counts 36 and 37 in violation of 18 U.S.C. §1001.*

The case was assigned to the Honorable Ann Aldrich. Mr. Hughes filed a motion for recusal and/or disqualification pursuant to 28 U.S.C. §144. Judge Aldrich denied the motion on July 25, 1986. Both Mr. Hughes and the government filed supplemental memoranda regarding the motion. Judge Aldrich, by Order dated October 20, 1986, analyzed the motion pursuant to 28 U.S.C. §144 and §455. She held that her prior ruling was correct and reaffirmed denial of the

* The evidence established that Mr. Hughes was not personally enriched in any manner and did not receive any funds either directly or indirectly; rather, the charges involved record keeping violations.

motion to recuse and/or disqualify. Mr. Hughes then applied for a writ of mandamus directing the trial judge to recuse herself. The writ was denied by the court of appeals on the ground that a motion to recuse or disqualify was reviewable only from a final motion adjudicating the case on the merits.

The case went to trial on July 1, 1987. Following the government's evidentiary presentation, Mr. Hughes moved for acquittal in accordance with Fed. R. Crim. P. 29. The trial court granted the motion as to Counts 1 through 12 and Counts 19 through 28 (mail fraud and embezzlement charges) on the basis of this Court's decision in *McNally v. United States,* 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987).

On July 31, 1987, the jury found Mr. Hughes guilty of the fifteen remaining counts in the indictment.[1] Mr. Hughes moved for a new trial and/or judgment of acquittal in regard to Counts 36 and 37 (18 U.S.C. §1001) and in regard to Counts 33 and 34 (26 U.S.C. §7206(2)). The trial court granted the motion as to Counts 36 and 37 and acquitted Mr. Hughes of those charges. As to Counts 33 and 34, the trial court held that it would sentence Mr. Hughes under the misdemeanor provisions of 26 U.S.C. §7204 rather than under the felony provisions of 26 U.S.C. §7206.

Pursuant to 29 U.S.C. §504(a), Mr. Hughes' convictions barred him from holding union office for a period of three years. Mr. Hughes moved that the judge stay this disability pending appeal. The motion was denied. Mr. Hughes was sentenced on November 13, 1987 and filed a notice of appeal on November 19, 1987. He then filed a petition for writ of mandamus to order

[1] Count 35 was dismissed after submission to the jury due to a typographical mistake in the indictment.

the judge to exercise her jurisdiction under Fed. R. Crim. P. 38(f). Although the court of appeals did not grant the petition, on January 13, 1988 the court stayed the disability under its inherent power. Unfortunately, due to the two month lapse, Mr. Hughes' CWA position had already been assumed by another individual.

By Order dated April 4, 1990, the court of appeals affirmed the district court's judgment in part and reversed in part. Specifically, the court of appeals reinstated the jury's felony convictions as to Counts 36 and 37; upheld the district court's reduction of the Count 33 felony conviction to a misdemeanor; reversed the district court's denial of a similar reduction as to Count 34; and affirmed the district court's denial of Mr. Hughes' motions for recusal and/or disqualification. Mr. Hughes' motion for rehearing was filed on or about April 17, 1990 and was denied by Order dated May 21, 1990. Mr. Hughes filed a motion to stay issuance of the mandate which was granted by Order dated June 12, 1990 provided that the application for certiorari be effected within thirty days. This Petition for Writ of Certiorari timely followed.

REASONS FOR GRANTING THE WRIT

First Question Presented:

This case gives the Court the opportunity to make clear that 28 U.S.C. §455(a) focuses upon the reaction of the reasonable lay observer to the facts argued in support of recusal—a reaction which may be different from that of those persons trained in the law.

During his history of union service, Mr. Hughes had been involved in both the political and federal judicial selection process. At a meeting with President Carter in 1980, Mr. Hughes, at the request of Senator John Glenn, requested the President to sign the final documents approving appointment of the Honorable George White to the federal bench. The President did so on June 6, 1980—the day before he signed the appointment papers for the Honorable Ann Aldrich.

In September of 1980, Mr. Hughes met Judge Aldrich on a plane while flying from Washington, D.C. to Cleveland, Ohio. Judge Aldrich and Mr. Hughes discussed his actions in regard to Judge White. Judge Aldrich told Mr. Hughes that she held him responsible for the fact that she had lesser seniority than Judge White within the federal court.

28 U.S.C. §455(a) embodies an objective standard of whether a disinterested lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988). In *Liljeberg*, this Court recognized that although the view of the "reasonable person" may not always be fair or even accurate, it is still the standard that must be applied: "[P]eople who have not

served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Id.*, 486 U.S. at 865, 108 S. Ct. at _____, 100 L. Ed. 2d at 875. Furthermore, as opposed to the earlier "duty to sit" standard, §455 requires a judge to resolve doubts in favor of disqualification. *United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987), *cert. denied sub nom., Alabama State University v. Auburn University*, 487 U.S. 1210, 108 S. Ct. 2857, 101 L. Ed. 2d 894 (1988).

Mr. Hughes would respectfully suggest that because the facts giving rise to the claim of partiality involve the internal workings of the court system, both the trial court and the court of appeals assumed a position which would not be readily apparent or agreed to from the perspective of the lay observer.

The trial judge denied Mr. Hughes' motion for recusal/disqualification because she felt that Judge White's greater seniority within the court system constituted a *de minimis* benefit. However, the fact that, in the trial judge's opinion, Judge White's greater seniority may or may not constitute a benefit is not the issue in this case; rather, the issue is whether the lay observer would view Judge Aldrich's statement that she held Mr. Hughes responsible for her lesser seniority as creating an "appearance of partiality." That such a statement would be viewed as creating an "appearance of partiality" was recognized by both the government and trial court.

As to the government, it filed a memorandum in regard to Mr. Hughes' motion for recusal, after Judge Aldrich's opinion of July 25, 1986, because the government felt that the statement alleged to have been made by Judge Aldrich carried "heavy implications of intolerance." App. at A35.

As to the trial court, during the course of the trial, Mr. Hughes called Judge White as a character witness on Mr. Hughes' behalf. Judge Aldrich held that the government could not question Judge White as to his appointment to the federal bench because: "You are putting before this jury what could be a totally unrealistic I think political jumble that could very well have an effect on how the jury would deliberate. . . . I think that there is too much potential prejudice I think in too many directions to really anticipate where it would go." App. at A54 and A55.

The Honorable Learned Hand described prejudice as "the chance that [a matter] will divert the jury from facts which should control their verdict." *United States v. Krulewitch*, 145 F.2d 76, 80 (2d Cir. 1944). If the trial judge was concerned that the jury might react unpredictably to testimony regarding Judge White's appointment to the federal bench, it would seem that a §455(a) hypothetically disinterested lay person would entertain significant doubt about the judge's impartiality.

The court of appeals compounded the problem by making no mention in its decision of the fact that Judge White had been precluded from testifying on the issue of his federal appointment and then stating that any benefits regarding seniority were truly *de minimis* "based upon the evidence presented." App. at

A12.[2] As in the case of the trial court, the court of appeals failed to consider the effect of such a statement on the average lay observer. Moreover, the trial judge prevented Judge White from testifying concerning the importance of greater seniority to him.

Seniority may be of little importance to a federal judge. This is not necessarily the perspective of the objective lay person, however, and the claim of lack of importance becomes even more questionable to the average person when the trial judge has stated that she holds the defendant responsible for this lesser seniority. Furthermore, it is not whether the incidents of lesser seniority are sufficiently horrid to motivate bias; rather, the focus must be upon the reaction of a disinterested person to knowledge that the judge in a trial holds the defendant directly responsible for her junior status.

The present case is not one where the defendant waited until the trial had already begun or had concluded before first raising the issue of recusal. Mr. Hughes, as a lay person, believed from the beginning that there was a possibility that Judge Aldrich had a personal bias against him. He therefore not only filed a motion to recuse prior to trial, but he also petitioned for a writ of mandamus directing Judge Aldrich to recuse herself.[3]

---

[2] Such a decision is also contrary to the Sixth Circuit's earlier holding in *Easley v. University of Michigan Board of Regents*, 853 F.2d 1351 (6th Cir. 1988), in which the court remanded a case for an evidentiary hearing due to the insufficient evidence on the record.

[3] The Circuits are in direct conflict concerning the proper procedure to challenge a judge's refusal to recuse herself. The Sixth Circuit in this case held that a motion to recuse is not reviewable by way of writ of mandamus. App. at A43. The Seventh Circuit has held that when a judge denies a motion to recuse, the party's sole recourse is to file a petition for a writ of mandamus. *United States v. Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985), *cert. denied sub nom., DiSalvo v.*

(Footnote continued on following page.)

In *In re Allied-Signal Inc.*, 891 F.2d 967, 972 (1st Cir. 1989), *cert. denied, Acw Arwall, Inc. v. United States Dist. Court for Dist. of Puerto Rico*, 495 U.S. _____, 110 S. Ct. 2561, 109 L. Ed. 2d _____ (1990), the First Circuit recognized that "the parties' own words and deeds may help determine the extent to which a knowledgeable observer would see, in a particular circumstance, a sign of partiality." The government's response to Judge Aldrich's alleged statement, the trial court's concern of the prejudicial effect of testimony relating to Judge White's appointment to the federal bench, and the fact that the defendant took all steps available to him to have the trial judge recused prior to the trial of this case all go to establish that the objective lay observer would find that an "appearance of partiality" existed and that the judge should have recused herself from the case.

Under this Court's decision in *Liljeberg, supra*, it is enough that the average lay person would have doubts about a judge's impartiality. That standard was clearly met in the present case.

(Footnote continued from preceding page.)

United States, 475 U.S. 1095, 106 S. Ct. 1490, 89 L. Ed. 2d 892 (1986). The Eleventh Circuit has stated that it disagrees with the Seventh Circuit and that it will entertain a §455(a) recusal claim on direct review so long as it is properly preserved by a timely motion. *Hardy v. United States*, 878 F.2d 94, 97 n.4 (2d Cir. 1989).

Second Question Presented:

The Petition for Writ of Certiorari should be granted so that the Court can clarify the materiality requirement of 18 U.S.C. §1001. The Due Process Clause of the Fifth Amendment demands that a law not be unreasonable, arbitrary, or capricious. In the present case, the court of appeals' construction of 18 U.S.C. §1001 is so overly broad that it fails to give proper notice of what constitutes a crime and permits the most trivial of acts to constitute a crime.[4]

The Labor-Management Reporting & Disclosure Act ("LMRDA"), 29 U.S.C. §431(c), requires the CWA to file an annual LM-2 report with the Secretary of the United States Department of Labor. The form is extensive and requires, among other items, a report of the salary and expenses of each employee who received total payments of more than $10,000.00 during the year. Specifically, 29 U.S.C. §431(b)(3) provides that unions report:

> salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during the fiscal year, received more than $10,000 in the aggregate from [a union and its affilliates].

Pursuant to this statute, Schedule 10 of the CWA LM-2 reports submitted to the Department of Labor for the periods ending December 31, 1982 and December 31, 1983 accurately reflected the total amount of monies paid to an individual by the name of Gay Griffith; the statistical breakdown between wages and expenses, however, was incorrect. Richard Crino, a long-time Department of Labor official and a government witness in this case, testified that the Department uses Schedule 10 of the LM-2 reports to insure that particular employees do not receive significant overlapping salaries from multiple labor organizations.

[4] To permit this definition of materiality to stand would create a conflict among the circuits and, therefore, provides an appropriate basis for review.

Criminal statutes demand a narrow, specific application and generally are to be strictly construed. *Smith v. United States*, 360 U.S. 1, 79 S. Ct. 991, 3 L. Ed. 2d 1041 (1959); *United States v. London*, 550 F.2d 206 (5th Cir. 1977). 18 U.S.C. §1001 provides that making a false statement or submitting a false document to a federal government agency or department may qualify as a felony (full text found in Appendix). The statute is worded so broadly that "if we adopt a literal application of this statute, anything more than a casual social conversation with a Government employee would, without warning, subject the speaker to the possibility of severe criminal punishment. . . ." *Friedman v. United States*, 374 F.2d 363, 366 (6th Cir. 1967);[5] *accord, Alire v. United States*, 313 F.2d 31, 33 (10th Cir. 1962), *cert. denied*, 873 U.S. 943, 83 S. Ct. 1554, 10 L. Ed. 2d 699 (1963) (recognizing defendant's argument that if §1001 is "literally applied to every possible situation, it is arbitrary and capricious and in violation of the fifth amendment.")

Courts have therefore construed §1001 as not only having a materiality requirement in the first part of the statute ("knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact. . .") but, also, as having a materiality requirement in the second part ("makes any false, fictitious or fradulent statements or representations, or makes or uses any false writing or document. . . ."). *United States v. Chandler*, 752 F.2d 1148, 1151 (6th Cir. 1985). The

[5] Although this Court, in *United States v. Rodgers*, 466 U.S. 475, 104 S. Ct. 1942, 80 L. Ed. 2d 492 (1984), faulted the Eighth Circuit's final decision in *Friedman*, this Court did not overrule *Friedman* nor did it fault the Eighth Circuit's concern over the literal, overly broad application of §1001.

statute "will not be stretched beyond, it will be strictly confined within, the fair meaning of its terms." *United States v. Moore*, 185 F.2d 92 (5th Cir. 1950).

The standard which has been applied by the courts is whether a statement "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." *United States v. Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975). The question is a matter of law, not of fact. *Id.*

In the present case, the district court determined as a matter of law that the false statements, *i.e.*, the amounts placed in the reimbursement column which should have been placed in the wages column, were not material and, therefore, that no violation of 18 U.S.C. §1001 had occurred. The trial court appropriately applied the test of materiality by relating the false statements to the government agency's functioning in order to determine whether the false information was capable of influencing the agency's decision-making or of affecting the department's functioning. The court found that the "chief purpose for requiring these figures was to call attention to those individuals who were being paid by more than one union and to 'adequately describe' the total amount each employee was paid. . . . As to these purposes, the LM-2's were correct." App. at A24-A25. Based upon this determination, the trial court held that the false statements did not rise to the level of "materiality" prosecutable under §1001. *Id.* at A25. As such, the government failed to meet its burden of proving that the false statements had a natural tendency to influence or were capable of influencing the agency.

The court of appeals reversed, not because it disagreed with any evidentiary finding of the trial court but, rather, because the court of appeals found that the request for information was enough to make it material.

> Since Congress specifically required a union to disclose the amounts it disburses in salary and reimbursement expenses for each employee who received over $10,000, and the LM-2 form provided by the Department of Labor requires the union to separately list the amounts given to an employee for salary and for reimbursed expenses, it follows that a false reporting of information specifically required to be disclosed is material.

App. at A7.

This holding provides such a broad definition of the term "material" as to render §1001 arbitrary and capricious and in violation of the Fifth Amendment. In essence, the court of appeals has stated that so long as the government requires disclosure of certain information, this renders such information material for purposes of §1001. In addition, the decision does away with the government's burden of proving that the false statement had intrinsic capabilities toward influencing agency decision-making under the circumstances at issue; a burden which clearly was not met in the present case. *See, Beer, supra; United States v. Talkington*, 589 F.2d 415 (9th Cir. 1979).

Indeed, the court of appeals' decision was based neither upon the intrinsic capabilities of the information nor upon any intended purpose of the Department of Labor but, rather, was based upon the mere fact that the information had been requested. The court then equated this request for information with a finding that it had the potential of influencing the governmental agency.

The fact that information is requested may make it relevant. The request, however, cannot automatically make the information material for purposes of §1001.

"To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, *i.e.*, reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material." *Weinstock v. United States*, 231 F.2d 699 (D.C. Cir. 1956).

Materiality must be determined by the specific role which false statements are capable of playing in a particular agency's decisions or the natural tendency to influence which may be inherent in certain false information. The court of appeals stated that the statements "were clearly of the type capable of influencing the department. . . ." App. at A7. However, as previously discussed, being the general "type" of information, standing alone, does not prove materiality.

In the present case, the court of appeals applied an overly broad, literal interpretation and application of §1001 in contravention of the requirement that criminal statutes be read narrowly. Furthermore, the court of appeals' decision is in contravention of the materiality requirement imposed upon §1001 throughout the circuits in order that the statute not run afoul of the Fifth Amendment to the United States Constitution.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari in order to make clear the proper standard to be applied pursuant to 28 U.S.C. §455(a), as well as to make clear that 18 U.S.C. §1001's materiality requirement must be strictly adhered to in order to comply with the Due Process Clause of the Fifth Amendment to the United States Constitution.

Respectfully submitted,

CATHERINE M. BALLARD
Counsel of Record
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
Counsel for Petitioner

Of Counsel:

PERCY SQUIRE
BRICKER & ECKLER
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300

APPENDIX

JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed April 4, 1990)

[*RECOMMENDED FOR FULL TEXT PUBLICATION*]
See Sixth Circuit Rule 24

NOS. 87-4052, 87-4069 & 87-4125

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARTIN J. HUGHES,
Plaintiff-Appellant/
Cross-Appellee
(87-4052 & 87-4125),

v.

UNITED STATES OF AMERICA,
Defendant-Appellee/
Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO.

UNITED STATES OF AMERICA,
Respondent (87-4069),

v.

MARTIN J. HUGHES,
Petitioner.

ON PETITION FOR WRIT OF MANDUMUS.

Before BOGGS and NORRIS, Circuit Judges; ENGEL, Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge. Defendant, Martin J. Hughes, appeals from his conviction on twelve counts of a thirty-seven-count indictment charging him with various federal criminal offenses. The government also appeals the district court's decisions acquitting defendant on two of the counts and reducing his conviction to a lesser included offense on another count. For the reasons stated below, we affirm the district court's judgment in part and reverse in part.

I.

On May 6, 1986, the grand jury issued a thirty-seven-count indictment against defendant, a district vice-president for the Communications Workers of America, AFL-CIO ("CWA"), charging him with mail fraud, embezzlement, falsification of union records, aiding and assisting in the filing of false W-2 and W-3 forms with the Internal Revenue Service ("IRS"), and with making false statements to the United States through the submission of falsified labor reporting documents. The

government alleged that defendant submitted to the CWA International office expense vouchers that falsely claimed reimbursement for mileage and meal expenses for union employees. The government alleged that defendant received nearly $400,000 in reimbursement funds from the CWA International and used those funds to make political contributions and to pay salaries at the United Telephone Credit Union ("UTCU").

Specifically, the government charged defendant in Counts 1 through 6 and Counts 19 through 23 with mail fraud, in violation of 18 U.S.C. §1341. Counts 7 through 12 and Counts 24 through 28 charged defendant with embezzlement, in violation of 29 U.S.C. §501(c). Counts 13 through 18 and Counts 29 through 32 charged defendant with falsification of union records, in violation of 29 U.S.C. §439(c). Counts 33 through 35 charged defendant with aiding and assisting in the filing of false W-2 and W-3 forms to the IRS, in violation of 26 U.S.C. §7206(2). Finally, Counts 36 and 37 charged defendant with making false statements to the United States through the submission of false labor reporting documents, in violation of 18 U.S.C. §1001.

The case proceeded to trial on July 1, 1987. Before the case was sent to the jury, the district court dismissed Counts 1 through 12 and Counts 19 through 28, the mail fraud and embezzlement charges. After the case had been submitted to the jury, the court dismissed Count 35, one of the tax charges, because of a typographical mistake in the indictment. The jury returned guilty verdicts on each of the remaining counts.

Defendant then moved for acquittal on Counts 33, 34, 36, and 37. The court acquitted defendant of the felony charges in Counts 36 and 37, finding as a matter of law that false statements made by defendant were not

material. The court also reduced defendant's conviction of a felony under 26 U.S.C. §7206(2) to the lesser included misdemeanor under 26 U.S.C. §7204 in Count 33. The court refused to reduce the felony conviction under section 7206(2) in Count 34.

Defendant was sentenced to two years' probation and fined $10,000.

The government appeals the district court's action in acquitting defendant on Counts 36 and 37, and reducing the felony conviction on Count 33.

Defendant appeals the district court's decisions denying his motions for acquittal on Count 34, for recusal, for mistrial, and to dismiss the entire indictment in light of the holding in *McNally v. United States*, 483 U.S. 350 (1987).

II.

A. *The False Statement Counts Under 18 U.S.C. §1001*

The government contends that the district court erred in acquitting defendant on the felony charges under 18 U.S.C. §1001 in Counts 36 and 37, when it concluded as a matter of law that false statements made by defendant were not material.

Section 1001 is a general prohibition against falsifying information given to government agencies, and provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain

> any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Although the statute explicitly mentions materiality only in the first clause, courts have read such a requirement into the second clause as well "in order to exclude trivial falsehoods from the purview of the statute." *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983). Under section 1001, a false statement to a federal agency is material even if it does not actually influence a decision of the agency, so long as it has a natural tendency to influence or is capable of influencing a decision of the agency. *United States v. Chandler*, 752 F.2d 1148, 1151 (6th Cir. 1985).

However, materiality "is not an element of the offense that must be proved beyond a reasonable doubt but a 'judicially imposed limitation to ensure the reasonable application of the statute.' " *Chandler*, 752 F.2d at 1151 (quoting *Abadi*, 706 F.2d at 180 n.2.). Accordingly, "materiality is a question of law for the court to decide." *United States v. Keefer*, 799 F.2d 1115, 1126 (6th Cir. 1986). "A materiality determination is subject to complete review on appeal and is not controlled by the clearly erroneous standard." *Chandler*, 752 F.2d at 1151.

In this case, the jury found that the defendant made false statements to the Department of Labor when he caused the CWA to file false LM-2 reports. These are the annual reports that unions are required to file disclosing, among other things, the salary and expenses of each employee who receives more than $10,000 during the year. *See* 29 U.S.C. §431(b)(3). Evidence demonstrated that the LM-2 reports filed by the CWA for 1982 and

1983 contained false entries showing Gay Griffith, the manager of UTCU, as a CWA employee who received $7,995 in 1982 and $10,540 in 1983 as reimbursement for expenses. In fact, these amounts were paid to Griffith as salary and were generated by the false expense vouchers filed with the CWA at the direction of defendant.

The district court found that the false statements were not material. The district court took into consideration that the total amount paid to Griffith was correctly stated, that the misstated amounts were small in relation to the union's total expenses, and the testimony of a labor department official that the chief purpose for requiring these figures was to call attention to persons who were being paid by more than one union and to "adequately describe" the total amount the union paid to each employee. The court also relied upon the fact that the false statements had no effect on any determinations by the Department of Labor, even though the court also noted that the government need not prove such an effect to sustain a conviction under section 1001. Finally, the court considered the fact that Congress had also included in the Labor Management Reporting and Disclosure Act a prohibition against making material false representations in documents required by the Act, but provided that a violation would be punished as a misdemeanor, rather than a felony. 29 U.S.C. §439. The court acknowledged that the United States Supreme Court, in *United States v. Batchelder*, 442 U.S. 114 (1979), held that if two separate laws cover certain criminal activity, the government may prosecute under either law. However, the district court felt that the existence of a misdemeanor statute covering the making of false statements to the Department of Labor was relevant in determining the issue of materiality.

The district court erred in concluding that the false statements were immaterial. The statements were clearly of the type capable of influencing the Department of Labor's information-gathering and regulatory decision-making process. Since Congress specifically required a union to disclose the amounts it disburses in salary and reimbursement expenses for each employee who receives over $10,000, and the LM-2 form provided by the Department of Labor requires the union to separately list the amounts given to an employee for salary and for reimbursed expenses, it follows that a false reporting of information specifically required to be disclosed is material.

The fact that the misstated amounts are relatively small when compared with total union expenditures is not particularly relevant to the issue of materiality. Instead, the relevant inquiry is whether the false information is of the type that is capable of influencing a decision of an agency, as opposed to an examination of the magnitude of the falsehood. *See United States v. Norris*, 749 F.2d 1116, 1121-22 (4th Cir. 1984) (false inclusion of $650 in expense statement totalling $35,584 is material), *cert. denied*, 471 U.S. 1065 (1985). Similarly, the district court's reliance upon the fact that Congress also provided that essentially identical conduct could also be punished as a misdemeanor is misplaced, especially in view of the court having acknowledged that "the false statements do rise to the level of materiality required" to violate the misdemeanor statute. Since the government may bring a prosecution for making a false statement to the Department of Labor under either 18 U.S.C. §1001 or 29 U.S.C. §439, *see United States v. Batchelder*, 442 U.S. at 123-24, and no different standard for determining materiality is set out in the statutes,

there is no basis for concluding that a statement that is material under 29 U.S.C. §439 is not also material under 18 U.S.C. §1001.

Accordingly, we reverse the district court's decision acquitting defendant on Counts 36 and 37 of the indictment. Upon remand, remand, the court is instructed to reinstate the jury's felony convictions on these Counts, and to resentence defendant accordingly.

B. *The False W-2 and W-3 Forms*

The government contends that the district court erred in reducing defendant's Count 33 felony conviction under 26 U.S.C. §7206(2) to a misdemeanor conviction under 26 U.S.C. §7204. Defendant contends that the district court erred by refusing to also reduce his felony conviction in Count 34 to a misdemeanor.

1. Count 33

In Count 33, the government charged defendant with aiding and assisting in the filing of a false W-3 wage transmittal form with the IRS. 26 U.S.C. §6051(a) provides that an employer who is required to deduct and withhold taxes from its employees must furnish to each employee a statement, the W-2 form, that sets forth the amount of wages the employee earned and the amount withheld in taxes. 26 U.S.C. §6051(d) provides that the employer must also file a duplicate of the statement with the IRS. This duplicate is the W-3 form.

26 U.S.C. §7206(2) provides, in pertinent part, that a person is guilty of a felony if he

> [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the

> internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.

26 U.S.C. §7204 provides that:

> *In lieu of any other penalty provided by law* (except the penalty provided by section 6674) any person required under the provisions of section 6051 to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051, or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than one year, or both. (Emphasis added.)

In reducing defendant's section 7206 felony conviction to a section 7204 misdemeanor offense, the district court concluded that section 7204 provides the exclusive sanction against an employer for submitting a false W-3 statement to the IRS and that it was a lesser included offense of that defined in section 7206.

The government argues that section 7204 deals exclusively with statements furnished to employees and does not cover the filing of a false W-3 form with the IRS, pointing to the language in that section providing that it is the exclusive sanction for persons who *furnish* a statement required to be *furnished* under section 6051 and that, while section 6051(a) provides that an employer shall *furnish* a W-2 to each employee, it provides that the W-3 statement shall be *filed* with the IRS.

While we agree with the government that section 7204 clearly is meant to provide the exclusive sanction for an employer who furnishes an employee with a false

W-2 statement, we do not agree that there is any linguistic distinction between furnishing and filing statements that compels our adopting its conclusion that the section does not apply when an employer files a false W-3 form. The W-3 form filed with the IRS is merely a duplicate of the W-2 statement furnished to the employee. When an employer furnishes an employee a false W-2, he necessarily files a false W-3 with the IRS. Under section 6051, an employer is responsible for both forms W-2 and W-3. Accordingly, we would render useless Congress' intent to punish as a misdemeanant a person who provides false information on a statement required by section 6051, if we were to hold that the government may charge an employer with a felony for filing a false W-3 form with the IRS.

2. Count 34

In Count 34, the government alleged that defendant violated section 7206(2) when he did "willfully aid and assist in, and procure, counsel and advise the preparation and presentation to the Internal Revenue Service of a Form W-2 Wage and Tax Statement for Gay Griffith by the Communications Workers of America." The district court held, and the government now concedes, that defendant could not have violated section 7206(2) merely by furnishing Griffith with a false W-2 form, since section 7204 provides the exclusive sanction for this act. However, the district court also found that the jury could have reasonably concluded that defendant took other steps in counseling Griffith to understate her income on her tax return and, therefore, the court refused to reduce defendant's felony conviction under section 7206(2).

However, a fair reading of the evidence would not permit the jury to conclude that defendant took any action with respect to the filing of Griffith's tax return other than causing the CWA to furnish her with a false W-2 form. Griffith expressly denied that defendant gave her any advice concerning the filing of her tax return.

Accordingly, we **affirm** the district court's decision reducing defendant's Count 33 felony conviction to a misdemeanor conviction, and **reverse** the court's denial of a similar reduction with respect to Count 34. Upon remand, the district court is instructed to **vacate** defendant's Count 34 felony conviction and to enter a misdemeanor conviction on that Count and resentence defendant accordingly.

C. *The Recusal Motion*

On two occasions, defendant moved for recusal or disqualification of the district judge, the Honorable Ann Aldrich. In his motions, defendant filed an affidavit stating that, at defendant's request, President Carter signed the final documents approving the appointment of the Honorable George White to the bench of the Northern District of Ohio one day earlier than he signed Judge Aldrich's commission, giving Judge White greater seniority. Judge Aldrich acknowledged that Hughes was responsible for her "lesser seniority" but, nonetheless, denied the motions.

Under 28 U.S.C. §§144 and 455, a judge must recuse herself if a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 2203-05 (1988); *United States v. Story*, 716 F.2d 1088, 1090-91 (6th Cir.

1983). Given the marginal nature of the benefits that a judge receives by having greater seniority, we believe that, under the circumstances of this case, a reasonable, objective person, knowing all the circumstances, would not have questioned Judge Aldrich's impartiality. The "benefits" of which Judge Aldrich was supposedly deprived by her lesser seniority are, in the case at hand, truly de minimis based upon the evidence presented. Based upon the large number and pattern of appointment of judges in the Northern District of Ohio, it is quite implausible that either Judge White or Judge Aldrich would ever become chief judge, with whatever perquisites that might imply. There is not the slightest hint that whatever precedence has existed in items such as office selection, etc., has been of any significance either in fact, or in the estimation of either judge. Thus, it is quite clear that under the circumstances of this case, a reasonable, objective person, knowing all the circumstances, would not have questioned Judge Aldrich's impartiality.

Accordingly, we affirm the district court's decision denying defendant's motions for recusal or disqualification.

D. *Defendant's Other Contentions*

Defendant also contends that the district court erred in denying his motion for a mistrial and denying his motion to dismiss the entire indictment in light of the holding in *McNally v. United States*, 483 U.S. 350 (1987). We believe that defendant's arguments with respect to these issues are without merit, and we, therefore, affirm the district court's decisions on these remaining issues.

III.

For the foregoing reasons, the judgment of the district court is **affirmed in part and reversed in part**, and this cause is remanded for further proceedings consistent with this opinion.

REFERENCE DATA

Case Name: Hughes v. United States

Case Numbers: 87-4052/4069/4125

Argued: October 6, 1989

Case Below: Ohio D.C. No. CR 86-98 (Aldrich)

Before: Danny J. Boggs and Alan E. Norris, Circuit Judges; Albert J. Engel, Senior Circuit Judge.

Author: Alan E. Norris, Circuit Judge

Counsel for appellant: Percy Squire, Columbus, OH.

Counsel for appellee: John J. Siegel, Cleveland, OH.

FULL COUNSEL

Percy Squire,* Columbus, Ohio, for appellant.

John J. Siegel,* and Christian Stickan,* Assistant United States Attorney, Cleveland, Ohio, for appellee.

Merritt C. Deitz, Jr. (Hughes), Sebree, Kentucky, for appellee.

Michael P. Butler, Assistant Prosecuting Attorney, Cleveland, Ohio, for amicus curiae.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed November 13, 1987)

Criminal Action No. CR86-98

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARTIN J. HUGHES,
Defendant.

MEMORANDUM AND ORDER

ALDRICH, *J.*

Defendant Martin J. Hughes moves for acquittal or a new trial on counts 33, 34, 36 and 37 of the indictment. Count 33 relates to the filing of a false W-2 form and count 34 to the filing of a false W-3 form, both in violation of 26 U.S.C. §7206(2), counts 36 and 37 relate to the filing of false LM-2's with the Department of Labor.[1]

---

[1] Hughes himself did not file with the government any of the forms in question. The evidence demonstrated that Hughes, by submitting false expense vouchers to the CWA, caused the CWA to incorrectly complete W-2, W-3 and LM-2 forms. The CWA filed the W-3 and LM-2 forms with the government; the CWA furnished the W-2 forms to Gay Griffith, who then filed them with the IRS in connection with her income tax returns.

For the reasons set forth below, with respect to count 33, defendant's motion for acquittal or a new trial is denied; with respect to count 34, defendant will be sentenced under §7204 rather than §7206; and with respect to counts 36 and 37, defendant is acquitted.

I.

A.

Counts 33 and 34

Defendant argues that he should not be convicted under §7206(2), because Congress has specifically provided for a lesser penalty in §7204. §7204 states:

> In lieu of any other penalty provided by law (except the penalty provided by section 6674) any person required under the provisions of section 6051 to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051, or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

26 U.S.C. §7204 (1982) (emphasis added).

Section §7206 provides:

> (2) Aid or assistance.—[Any person who] [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.

. . .

> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

The government contends, in part, that §7204 applies only to the offense of furnishing a false W-2 to an *employee*, and that §7206 may still apply to the separate offense of assisting a person to file a false W-2 with the IRS. In addition, the government contends that §7204 applies only to W-2's and not to W-3's; so that defendant's motion as to count 34 is not well taken.

In order to fully understand the scope of §7204, it is necessary to trace its history, and the history of the sections to which it relates. Section 7204 was originally enacted in 1942 as §470 of the Internal Revenue Code of 1939. An identical provision was enacted in 1943 as §1626(a), and in 1949 was moved to §1643(a).

Congress passed the Revenue Act of 1942 to help fund the war effort. 56 Stat. 798. As part of this act, Congress provided for a "Victory tax," a 5% tax on the gross incomes of most employees. §172 *et seq.* of the Act; 26 U.S.C. §450 et seq. For the first time, this tax was to be collected as wages were earned, rather than in March of the following year, and employers were to be responsible for the collection.

The legislative history of §470 is not extensive, as Congress was more concerned about the severity of the tax and about other matters relating to the war. The Committee reports of both houses of Congress state that the penalties imposed by §470 "are prescribed in lieu of

the penalty imposed by §145[2] of the Code [which relates to the filing of false returns generally] and are much less severe than those displaced." H.R. Rep. No. 2333, 77th Cong., 2d Sess., at 132 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess., at 172 (1942). Section 145's monetary penalty was harsher than that of §7206, but its imprisonment penalty was less, and a violation of §145 was only a misdemeanor, while a violation of §7206 is a felony. Thus it can be fairly said that §7206, the provision in question, is harsher than §145, the provision which Congress in 1942 wished to preempt.

In 1943, Congress amended the tax code to provide for full withholding by employers, the system which exists today. 57 Stat. 126. Congress enacted §1626 to provide the same penalties for violating the general withholding provisions as were applicable to the victory tax withholding provisions. Both houses noted that the new sections were identical to then existing law. H.R. Rep. No. 268, 78th Cong., 1st Sess., at 24 (1943); S. Rep. No. 221, 78th Cong., 1st Sess., at 31.

---

[2] Section 145(a) provided:

> (a) Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

Congress also added section §1626(d), which provided that employees shall be liable for criminal penalties if they submit a false withholding form to their employers. Section 1626(d) is the present §7205. The House version of §1626(d) explicitly referred to §145, discussed above. The Senate amendment moved the section from an amendment to §470 to a separate subchapter. In doing so, the Senate noted that it was changing the explicit reference to §145 in the House version to the current language, because it was moving the section from Chapter 1 of the IRS Code to Chapter 9. S. Rep. No. 221, 78th Cong., 1st Sess., at 31.

Section 145(a) did not become §7206 in the 1954 recodification of the Code; rather, similar provisions were enacted as §§7201[3] and 7203.[4] The predecessor of

---

[3] §7201. Attempt to evade or defeat tax.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[4] §7203. Willful failure to file return, supply information, or pay tax.

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§7206(2) was §3793(b)[5] which, except for minor differences, is identical to §7206(2), and was contained in Chapter 38, entitled "Miscellaneous Provisions." Section 3793(b) was part of the 1939 Code, having been enacted in 1926. Thus, it can be fairly presumed that Congress intended §3793(b) to be one of the penalties which §1626(a) would be "in lieu of."

The government argues that to hold that only the filing of a false return can support a §7206(2) violation ignores a long line of "10 percenter" cases,[6] where individuals were convicted under §7206(2) for fraudulently filing a form 1099/W-2G. What the government misses is that there is no counterpart to §7204 for a form 1099. No provision of the IRS Code specifies a penalty, in lieu of all others, to be applied for fraudulently completing a form 1099. The Court does not hold that §7206(2) is limited to the filing of an income tax return; rather, it holds only that the "in lieu of any other penalty under law" provision of §7204 means exactly what it says.

---

[5] (b) Fraudulent returns, affidavits, and claims

(1) Assistance in preparation or presentation. Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

[6] In these cases, an individual agrees to redeem a winning gambling ticket, usually a racing ticket, for another, in return for 10% of the winnings. In this way, the true owner of the ticket does not have to fill out the required Form 1099/W-2G, and, because the IRS would have no matching record against which to check, is able to easily understate his income on his tax return.

As the government states, §7205 is a counterpart to §7204. As stated above, §7205 was originally enacted in 1943 as §1626(d), with the identical "in lieu of" language found here. Section 7205, however, was recently amended. In 1984, as part of the Deficit Reduction Act, Congress deleted the "in lieu of" language of §7205, and substituted the words "in addition to any other penalty." 98 Stat. 494. The Senate report states that the amendment would allow, for example, prosecution under §7201 for willful evasion of taxes, as well as prosecution for the filing of a false W-4 under §7205. H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess., 1001, *reprinted in* 1984 U.S. Code Cong. & Admin. News 751, 995. That this is a clear break from prior law is evinced by the fact that §7201's predecessor was §145, the section under which the 1943 Congress explicitly did not wish the filing of a false W-2 to be prosecuted. The 1984 Congress' attention was certainly drawn to the "in lieu of" language. Although this Court does not give overriding weight to Congress' failure to amend §7204 in 1984, at least an inference can be made that had Congress meant to abolish the "in lieu of" language altogether, it could have done so. Section 7204 is not a section buried in another part of the Code; it is next to, and a counterpart of, §7205.[7]

[7] The Conference agreement regarding the amendment of §7205 states that "No inference should be drawn with respect to the correct interpretation of prior law on this issue," thus negating any inference that this amendment is simply a clarifying amendment, 45 years after the fact. The report goes on to state, however, that "however, to the extent that *United States v. Williams*, 644 F.2d 696 (8th Cir. 1981) might be considered authority to the contrary, the rationale of that decision no longer applies." The only way to make sense of this last phrase is that the Conference Committee was saying not that *Williams*' interpretation of *prior* law was incorrect, but that the *Williams* interpretation is overruled by the amendment. In other words, the amendment is forward-looking only. This comports with the Senate's statement that the amendment is effective for acts and failures to act occurring *after* the date of the amendment.

B.

This, however, does not end the Court's consideration. There are additional questions relating to Counts 33 and 34 which must be answered before the Court can rule on defendant's motion.

Count 33 alleges that Martin Hughes violated §7206(2) by causing the Communications Workers of America to file a false W-3 form with the Internal Revenue Service. Section 7204 is entitled "Fraudulent statement or failure to make statement to employees." Because of that title, the government argues that §7204 covers only W-2 statements furnished to employees, and not W-3 forms which must be filed with the government.

Section 6051, entitled "Receipts for employees", is the substantive provision requiring W-2 forms to be furnished to employees. Subsections (c) and (d) state as follows:

> (c) Additional requirements.—The statements required to be furnished pursuant to this section in respect of any renumeration shall be furnished at such other times, shall contain such other information, and shall be in such form as the Secretary may by regulations prescribed. The statements required under this section shall also show the proportion of the total amount withheld as tax under section 3101 which is for financing the cost of hospital insurance benefits under part A of title XVIII of the Social Security Act.
>
> (d) Statements to constitute information returns.—A duplicate of any statement made pursuant to this section and in accordance with regulations prescribed by the Secretary shall, when required by such regulations, be filed with the Secretary.

The IRS regulations under §6051 require employers to file W-3 forms; 26 C.F.R. §31.6051-2; and thus the forms come within the provisions of §7204.

The historical evidence is also clear. In the Congressional hearings in 1942, the question of employers submitting copies of their employees' receipts (what are now W-2's) to the IRS was considered. The consensus in 1942 was that this practice would be too burdensome on employers. Hence it was decided that full copies would not be necessary, and that instead, employers would be required to submit only a form which summarized the individual receipts (what is now the W-3). S. Rep. No. 3987, 77th Cong., 2d Sess., at 126-28 (Senate Finance Subcommittee Hearing, "Data Relating to the Withholding Provisions of the 1942 Revenue Act"). In enacting §1626 in 1943, Congress intended what were to become the W-3 forms to be covered by the section's "in lieu of" prohibition against other penalties.

Because Congress has provided for a penalty different than that provided in §7206 for the filing of false or fraudulent W-3 forms, and because Congress intended §7204 to replace any penalty otherwise provided by §7206, defendant's conviction of violating §7206 by assisting the CWA to file a false W-3 cannot stand. However, the jury clearly found that Hughes did assist the CWA in filing a false W-3. The Court finds that the violation of §7204 is a lesser included violation of §7206, and so, consonant with defendant's request, Memorandum in Support of Motion for Acquittal at 6, finds him guilty of violating the misdemeanor provisions of §7204. *Cf. United States v. Runnels,* _____ F.2d _____ (6th Cir. Oct. 19, 1987) (defendants convicted on facts jury necessarily found, but on theory not actually presented at trial).

C.

As made clear above, the simple fact of providing, or helping to provide, an individual with a fraudulent W-2 is not punishable under §7206(2) because of §7204's "in lieu of" provisions. However, the evidence at trial showed that Hughes went further than merely providing Griffith with the false W-2's. Based on the evidence presented, the jury could have found beyond a reasonable doubt that Hughes additionally counseled Griffith to understate her income on her income tax return, by reporting as income only that amount shown on the W-2 and not the additional income which she received as "expenses." Defendant himself cites three cases in which persons were convicted for violating §7206(2) by assisting and counseling individuals to file false income tax returns, part of which assistance was to provide the individuals with false W-2 forms. *United States v. MacKenzie*, 777 F.2d 811 (2d Cir. 1986); *United States v. Isaksson*, 774 F.2d 574 (7th Cir. 1984); *United States v. Barnes*, 313 F.2d 325 (6th Cir. 1963). In a sense, the false W-2 form is irrelevant. As long as there are other actions violative of §7206, the fact that the defendant may also have provided an individual with a false W-2 does not prevent a §7206 conviction.

The only remaining question is whether Hughes was indicted for assisting Griffith in preparing a false income tax return, which in part consisted of providing her with a false W-2; or whether Hughes was indicted solely for the act of providing Griffith with a false W-2.

Count 34 alleges:

> 2. That on or about February 16, 1983, the exact date being unknown to the grand jury in the Northern District of Ohio, Eastern Division, MARTIN J. HUGHES, a resident of Rocky River,

> Ohio, did willfully aid and assist in, and procure, counsel and advise the preparation and presentation to the Internal Revenue Service of a Form W-2 Wage and Tax Statement for Gay Griffith by the Communications Workers of America. AFL-CIO (CWA) for the calendar year 1982, which was false and fraudulent as to a material matter, in that the Form W-2 represented that Gay Griffith had received $10,625.00 in wages from the CWA for the calender year 1982 when, in truth and fact, as MARTIN J. HUGHES well knew, the Form W-2 did not report approximately $11,074.00 which the CWA paid to Gay Griffith as expenses but which amount was, in fact, the wages of Gay Griffith; all in violation of Title 26, U.S.C. §7206(2).

The count is hardly a model of clarity. However, the defendant was certainly put on notice that he would be tried on the question of whether he violated §7206(2) by helping to provide Gay Griffith with a false W-2 form. The Court reads Count 34 as charging that the defendant violated §7206 in part by providing Giffith with false W-2's, not that this was his only action allegedly in violation of §7206. The Court also reads Count 34 as charging that Hughes' presentation to the IRS of false forms in violation of §7206, was with forms prepared by the CWA, and not that the CWA itself presented the forms to the IRS. (If the latter interpretation were correct, the charge would fall within the "in lieu of" language of §7204, and a conviction under §7206 would be precluded). This interpretation of the count brings Hughes' actions within §7206, and comports with the three cases cited by the defendant.

Because count 34 can be fairly read to indict Hughes for actions which violate §7206 and which are not barred by the "in lieu of" provision of §7204; because defendant was put on notice that he was being charged with

violating §7206 in connection with providing Griffith with a false W-2; because there was evidence that, and the jury could have found beyond a reasonable doubt that, Hughes violated §7206(2) by counseling Griffith to understate her income, by counseling her to state as income only what appeared on a false W-2, which Hughes himself caused the CWA to prepare; the Court must uphold defendant's conviction under 26 U.S.C. §7206(2).

II.

Counts 36 and 37

Hughes was also indicted under 18 U.S.C. §1001 and §2 for causing the CWA to file false LM-2's. Labor Department regulations require all unions to file LM-2's annually.[8] Section 1001 contains a materiality requirement which is to be decided by the Court. *United States v. Abadi*, 706 F.2d 178 (6th Cir. 1983).

The evidence presented by the government showed that the LM-2's were false in the following respect. The CWA is to list in subsections D and F of Schedule 10 the total wages and expenses, respectively, paid to all persons. These two subsections are then totaled in subsection H, and the amounts for all individuals are totaled on line 8. The total amount paid to Gay Griffith was correctly reported on the LM-2's; what was incorrect was the break-down between wages and expenses. Furthermore, the amount by which the total figures were incorrect was approximately $7000 out of $19.5 million, or less than one-tenth of 1% of the total. The Labor Department official who testified stated that the chief purpose for requiring these figures was to call attention

[8] 29 C.F.R. §403.1 *et seq.*

to those individuals who were being paid by more than one union and to "adequately describe" the total amount each employee was paid. Tr. 2014-15. As to these purposes, the LM-2's were correct.

The Court previously had great difficulty in deciding the materiality question. *See, e.g.*, Tr. 2794-95; 2807-12. The amounts by which the LM's were false were extremely small. Still, the Court did not wish to label as "immaterial" a figure which Congress requires to be reported, and so the Court denied defendant's motion to find these figures "immaterial", and to therefore strike these two counts of the indictment.

Defendant, in his latest motion, has pointed out to the Court that Congress has enacted penalties explicitly relating to the making of false statements of any matter required to be reported under the Labor Management Reporting and Disclosure Act. 29 U.S.C. §§439(a) and (b).[9] As opposed to 18 U.S.C. §1001, which provides for a criminal sentence of up to 5 years, §§439(a) and (b) are misdemeanor offenses, providing for a sentence of up to one year.

The Court is mindful of *United States v. Batchelder*, 442 U.S. 114 (1979). There, the Supreme Court held that where two separate laws cover the criminal activity of

---

[9] Violations and penalties

(a) Willful violations of provisions of subchapter

Any person who willfully violates this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(b) False statements or representations of fact with knowledge of falsehood

Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

the defendant, the government has the option of which law it wishes to proceed under, and need not prosecute only under the law which provides for the lighter sentence. If that argument were the only basis for defendant's motion, it would have to be denied. Here, however, the Court finds that the false statements which Hughes caused the CWA to make do not rise to the level of "materiality" so as to be prosecutable under §1001. The misstatements are fairly minor, and had no effect on any determinations of the Labor Department (even though such an effect is not necessary for a misstatement to be in violation of §1001. *United States v. Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983)). And, this Court's earlier concern about finding immaterial the making of a false statement which Congress has required is allayed by Congress' providing the lesser penalty for the making of a false statement under the LMRDA.

Since the Court finds as a matter of law that the false statements made on the LM-2's referred to in counts 36 and 37 do not rise to the level of materiality required by 18 U.S.C. §1001, those counts are dismissed.[10]

III.

Defendant also argues, with respect to all four counts, that there was not sufficient evidence with which the jury could have found him guilty beyond a reasonable doubt. In deciding defendant's motion for acquittal under Fed. R. Crim. P. 29(c), the Court "must

[10] Implicit in this ruling and the Court's earlier ruling is that the false statements do rise to the level of materiality required to be in violation of 29 U.S.C. §439 and thus punishable as misdemeanor offenses. Hughes, however, was not charged under these statutes, and unlike §7204 and §7206, they cannot be considered lesser included offenses of 18 U.S.C. §1001.

view the evidence and all reasonable inferences in the light most favorable to the government." *Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. Holloway,* 731 F.2d 378, 381 (6th Cir. 1984). If a reasonable juror could fairly find the defendant guilty beyond a reasonable doubt, defendant's motion must be denied. *Holloway,* 731 F.2d at 381. There was more than sufficient evidence presented at trial that Hughes knowingly and willfully caused false expense vouchers to be made out, which caused the CWA to have false records, which in turn caused the CWA to prepare false W-2, W-3 and LM-2 forms. That Hughes caused the forms to be falsely completed and eventually submitted to the government is sufficient to find him guilty, under the various statutes, of assisting in the filing of a false form. *United States v. Kopituk,* 690 F.2d 1289, 1333 (11th Cir. 1982), *cert. denied,* 389 U.S. 1209 (1983); *see also* 26 U.S.C. §7206(2); *Nye & Nissen v. United States,* 336 U.S. 613, 619 (1949). Defendant's motion for dismissal or a new trial because of a lack of sufficient evidence is therefore denied.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed October 20, 1986)

Criminal Action No. CR86-98

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARTIN J. HUGHES,
Defendant.

MEMORANDUM AND ORDER

ALDRICH, *J.*

Following this Court's Memorandum and Order of July 25, 1986 denying defendant Martin J. Hughes' "Motion to Disqualify and/or Recuse the Honorable Ann Aldrich" ("recusal motion"), both the United States of America ("the government") and Hughes raise additional issues with respect to the recusal motion. For the reasons set forth below, the Court holds that its prior ruling denying recusal was proper, and it reaffirms its denial of Hughes motion.

I.

The recusal motion indicates that there are bases for disqualification or recusal under both Title 28 U.S.C. §144 (1982) ("§144") and Title 28 U.S.C. §455 (1982) ("§455"). Title 28 U.S.C. §144 (1982) provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

As amended in 1974, 28 U.S.C. §455 (1982) provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * *

In its Memorandum and Order of July 25, 1986, this Court held that recusal in this case was not permitted by either §144 or §455. Hughes now argues, for the first time, that this Court's decision that Hughes' affidavit was insufficient to support disqualification under §144 was improper because the §144 motion should have been decided by another judge. He cites *United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980), which states:

> Section 144 expressly conditions relief upon the filing of a timely and legally sufficient affidavit. *See Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *United States v. Azhocar*, 581 F.2d 735, 738-40 (9th Cir. 1978), *cert. denied*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979); *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir.), *cert. denied*, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976). If the judge to whom a timely motion is directed determines that the accompanying affidavit specifically alleges facts stating grounds for recusal under section 144, the legal sufficiency of the affidavit has been established, and the motion must be referred to another judge for a determination of its merits. *Azhocar*, 581 F.2d at 738.

Id. at 867. After comparing the purposes and operation of §144 and §455, the Ninth Circuit summarized:

> The net result is that a party submitting a proper motion and affidavit under section 144 can get two bites of the apple. If, after considering all the circumstances, the judge declines to grant recusal pursuant to section 455(a) & (b)(1), the judge still must determine the legal sufficiency of the affidavit filed pursuant to section 144. If that affidavit is sufficient on its face, the motion must be referred to another judge for a determination of its merits under section 144.

Id. at 868. This Court declines to follow *Sibla*, because that decision is contradicted by the plain language of

§144, is inconsistent with the Ninth Circuit precedent upon which it relied and is not the controlling law in the Sixth Circuit Court of Appeals.

Section 144 states that another judge shall be assigned to hear "such proceeding" after the making and filing of a timely and sufficient affidavit of personal bias or prejudice. The word "such" which modifies "proceeding" refers back to "any proceeding in a district court." This first reference to "any proceeding" precedes the discussion of the affidavit which a party is permitted to file. The language "such judge shall proceed no further therein" is susceptible to the construction that a judge must desist from activity in a case as soon as a potentially satisfactory affidavit is filed, thus requiring a colleague to pass upon the affidavit's sufficiency. However, that construction requires that the phrase "another judge shall be assigned to hear such proceeding" signifies consideration of the affidavit. The word "proceeding," then, would possess two different meanings within the same statute—first, referring to the case before the court; second, referring to the ruling on the sufficiency of the affidavit. While such an interpretation of the statute is possible, it is strained and improbable.

Sibla is also unpersuasive because it departs from prior Ninth Circuit precedent without proffering reasons for the change or even recognizing the departure. In *Sibla*, *United States v. Azhocar*, 581 F.2d at 735, is cited as authority for referring a §144 affidavit to another judge. However, review of the prior case reveals that the court rejected the appellant's contention that his §144 motion should have been referred to another judge for hearing. The *Azhocar* court determined that "[o]nly after the legal sufficiency of the affidavit is determined does it

become the duty of the judge to 'proceed no further' in the case." *Id.* at 738 (citations omitted). It noted that its holding was consistent with the statutory language and that a hearing on a §144 motion was unnecessary because the inquiry is limited to the facial allegations of the affidavit. *Id.* It concluded, "[W]hile the statute undoubtedly permits referring the disposition of an affidavit of bias to another judge, the adoption of such a procedure as a general rule would be unwise." *Id.* (citation omitted). Thus, *Sibla's* holding with respect to referral of a §144 affidavit is without support and is contradictory to the sound reasoning of *Azhocar.*

Finally, Hughes has not made the Court aware of any other jurisdiction which has followed the *Sibla* requirement of referral of a motion based upon §144. The Sixth Circuit has not confronted this precise issue. However, the prevailing view among the courts is stated by federal court commentators:

> On its face the statute might seem to contemplate automatic disqualification. It has not been read this way. It is settled that the judge has not only the right but the duty to examine the affidavit and certificate to determine whether they are timely and legally sufficient.
>
> * * *
>
> It has been the common understanding that it is for the judge who is the object of the affidavit to pass on its sufficiency. There are obvious difficulties in asking that judge to make the determination, but no action was ever taken on a 1961 recommendation of the Judicial conference of the United States for legislation to require a judge other than the one against whom the affidavit is filed to pass on its sufficiency. There are a few cases in which a judge has referred the affidavit to the chief judge of his district and asked him to make the determination.

13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3551 (2d ed. 1984) (footnotes omitted).

The Sixth Circuit's opinion in *Amidi v. Surety Title Agency*, No. 84-3974 (6th Cir. July 1, 1985), is not inconsistent with the prevailing view on this issue. In that case, the appellate court concluded:

> Under the circumstances, and in view of the factual situation set out in the affidavits of appellant and its counsel, we conclude that disqualification of the district judge is indicated applying the reasonable person standard. In the event of further applications for recusal of this judge by the law firm involved, we suggest referral of such application to another district judge for determination.

Slip op. at 4. The *Amidi* court did not indicate either implicitly or explicitly that all recusal motions filed before this Court should be referred to another judge where bias is alleged by lawyers or parties. Hughes was not involved in the *Amidi* motion. Even had *Amidi* not been carefully limited to the specific controversy then before that court, it would be entitled to receive only the limited authoritative force accorded to unpublished opinions by 6th Cir. R. 24(b).[1] Moreover, the *Amidi* court did not indicate that this Court erred procedurally in evaluating the affidavit for itself, but instead held that this Court reached an incorrect result in its evaluation of

---

[1] Sixth Cir. R. 24(b) provides:

> Citation of unpublished decisions by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.
>
> If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the decision in an addendum to the brief.

the affidavits. If this Court were incorrect in passing upon the sufficiency of the affidavits under §144, the appellate court, most logically, would have remanded the case for consideration by another judge, rather than reaching the substance of the appellant's arguments. In the absence of any requirement by the Sixth Circuit that §144 affidavits should be routinely referred to other judges, this Court declines to do so.

II.

The government notes that there may be a genuine issue regarding the propriety of this Court's resolution of the §144 motion without referral to another judge. However, its main concern with the Memorandum and Order of July 25, 1986 is that the Court did not address the statement that it allegedly made to Hughes that it holds him "responsible" for its lesser seniority. The government points out that such a statement carries "heavy implications of intolerance," and it invites this Court to consider the veracity of this part of the affidavit under §455. It cites *Idaho v. Freeman*, 507 F. Supp. 706, 721 (D. Idaho 1981), which states:

> If a judge who is being asked to disqualify himself cannot make all relevant facts known, or rebut those facts that are false and which if left unrefuted would create a reasonable question of impartiality, the result would be an essentially pre-emptive proceeding where the judge would be "the *victim* of the appearance of impropriety . . ." (emphasis added) with no recourse to remove a possible taint on his integrity. Furthermore, allowing a judge the liberty to evaluate the truth, as well as the sufficiency of the alleged facts, is compatible with the Congressional attempt to control bad-faith litigants' manipulation of the disqualification procedure. This is evident because section 144 has attending procedural requirements

> to prevent abuse of the disqualification process; section 455 on the other hand permits the judge to edit the inaccurate allegations which could be the basis for disqualification under an appearance of partiality standard.

At this juncture, the Court observes that the procedural safeguards of §144 were not satisfied in this case. Robert J. Rotatori, counsel for Hughes, has not filed a certificate stating that Hughes' affidavit is made in good faith. On this basis alone, Hughes' §144 motion must fail. *Morrison v. United States,* 432 F.2d 1227, 1229 (5th Cir. 1970), *cert. denied,* 401 U.S. 945 (1971). *Cf., Roberts v. Bailar,* 625 F.2d 125, 128 (6th Cir. 1980) (§144 motion was properly denied where plaintiff's counsel, rather than plaintiff, signed and filed the affidavit). *But cf. United States v. Hines,* 696 F.2d 722, 729 (10th Cir. 1982) (§455 motion improperly denied because of failure to file certificate of counsel).

However, the Court also held in its Memorandum and Order of July 25, 1986 that the allegations of the affidavit itself were insufficient to require recusal. The government correctly recognizes that this Court was required to accept the averment regarding "responsibility" as true for the purposes of evaluating the affidavit under §144. *See Berger v. United States,* 255 U.S. 22, 26 (1921). In order to evaluate the facial allegations of the affidavit, the Court construed the word "responsible" to mean that it accepted Hughes' indication that he was the cause of Judge White's "greater seniority" than this Court. It did not understand the word to be fraught with negative implications. Moreover, the Court concluded that the value of seniority in this district is negligible for a reasonable person to believe that this Court could not be impartial to Hughes.

With respect to the §455 motion, the Court likewise does not understand a statement regarding "responsibility" to indicate an attitude involving culpability. Moreover, it evaluates such statement by placing it in the context of a discussion with Hughes, in which Hughes approached the Court to explain his role in procuring the earlier commission for Judge White.[2] In this context, the act of responding to Hughes with such a statement does not carry the negative implications present when one purposely approaches an individual to inform him or her of his or her "responsibility." Instead, it is a normal reaction indicating belief in what has just been stated. In the context of the discussion initiated by Hughes, this Court's alleged statement that she holds Hughes "responsible" does not indicate prejudice or bias. Accordingly, the appearance of impartiality standard applicable under §455 does not require that the Court recuse from this case. The Court therefore reaffirms the conclusion of its Memorandum and Order of July 25, 1986, holding that disqualification or recusal inappropriate.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge

---

[2] Unlike §144, §455 does not require the Court to accept allegations of the affidavit as true. *Phillips v. Joint Legislative Committee*, 637 F.2d 1014, 1019-20 n. 6 (5th Cir. 1981), *cert. denied*, 456 U.S. 971 (1982); *see Roberts*, 625 F.2d 127 n. 3 (declining to reach the issue of whether the allegations of the affidavit must be accepted under §455). In disposing of the §455 motion in this case, it is unnecessary to dispute any material allegations of Hughes' affidavit. Since the §455 standard asks "what a reasonable person knowing all the relevant facts would think," *Roberts*, 625 F.2d at 129, it is appropriate place the conversation between this Court and Hughes into context. In essence, this Court had never met Hughes before he approached her at an airline gate in 1983 and changed his seat in order to sit next to her. In the ensuing conversation, Hughes told this Court that he had helped Judge White receive his commission earlier and that he meant no harm to this Court by his actions. The Court has no independent knowledge of the events in 1980.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed July 25, 1986)

Criminal Action No. CR86-98

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARTIN J. HUGHES,
Defendant.

MEMORANDUM AND ORDER

ALDRICH, *J.*

The defendant in this criminal action, Martin J. Hughes, has filed a "Motion to Disqualify and/or Recuse the Honorable Ann Aldrich." This Court has considered the motion carefully, searching the case law, the facts involved in this motion, and its conscience. For the reasons set forth below, Hughes' motion for recusal or disqualification of this Court is denied.

This Court is convinced that it holds no bias whatsoever against Hughes. However, the standard to be applied in deciding this recusal motion is not a subjective one, but rather an inquiry into what a reasonable person would think about the impartiality of the court. *Amidi v. Surety Title Agency,* No. 84-3974,

slip op. at 4 (6th Cir. July 1, 1985) (quoting *Roberts v. Bailer*, 625 F.2d 125, 129 (6th Cir. 1980)). Under 28 U.S.C. §144, the allegations of Hughes' affidavit must be accepted as true for the purposes of the motion. *Bailer*, 625 F.2d at 127 n. 3. Applying these fundamental principles, the Court will analyze the two reasons advanced by Hughes for its recusal.

First, Hughes' affidavit states, "I met Judge Aldrich on an airplane returning to Cleveland from Washington, D.C. in about September, 1980. At that meeting, she told me that she held me responsible for the fact that she had lesser seniority than Judge White within the federal court." The affidavit explains that Hughes reminded President Carter to sign final documents approving the appointment of the Honorable George White to the bench of the Northern District of Ohio, complying with a request of Senator John Glenn that Hughes should do so. It further explains that President Carter signed Judge White's appointment on June 6, 1980, while this Court was appointed on June 7, 1980.[1] The affidavit states Hughes' belief that "certain administrative court matters, such as allocation of office space, assignment of staff and committee appointments have been decided according to the respective judges' apointment dates."

This Court does hold Hughes responsible for her "lesser seniority" than Judge White, because Hughes advises that this is true. However, it is not likely that any "reasonable person" would perceive "lesser seniority" as of any significant consequence. This

[1] While accepting Hughes' statements as true for purposes of this motion, the Court notes that public records demonstrate that the commissions of Judge White, and seventeen other federal judges, were signed on May 23, 1980, and this Court's commission was signed on May 24, 1980. Seniority dates from the signing of the commission by the president.

district includes nine judges, all of which receive the same salary, set their own hours, control their own dockets, and otherwise enjoy considerable independence. Policy decisions for the court are made by majority vote, and each vote, including that of the chief judge, counts for one. General Order No. 98. The position of chief judge has recently been publicly described by the current incumbent as largely "ceremonial and administrative."

Moreover, no reasonable person could perceive Judge White's "greater seniority" as having anything more than a remote effect on the improbable conglomeration of contingencies that would have to occur for this Court to ever serve as chief judge. The current chief appears hale and hearty and has no known plan to retire. He is followed in seniority by Judge Lambros (age 56), Judge Manos (age 59), Judge White (age 58), and Judge Aldrich (age 59). Under the local rules of this district, one cannot become the chief judge after the age of sixty-five.[2]

Second, Hughes' affidavit discusses this Court's involvement in *Reimer v. Holt,* No. C82-52 (N.D. Ohio filed Jan. 11, 1982), a case in which Hughes was one of thirteen defendants. The affidavit states that Judge

---

[2] Other than the potential for becoming chief judge, defendant suggests two additional advantages based on seniority:

> (1) Although facilities are arguably apportioned based upon seniority, no reasonable person could find that this Court is biased because it is located in unsatisfactory chambers. There can be no doubt that this Court enjoys the finest chambers in the federal courthouse, and it has declined to move to new chambers as new judges with lesser seniority have been appointed.
>
> (2) Chairs of committees to administer the court are not awarded based upon seniority. Judge Krenzler, who has less seniority than both Judge White and this Court, is the chairman of the Space and Facilities Committee.

White recused himself from that case, and that Hughes believes that Chief Judge Battisti reassigned the case to Judge Krenzler while the clerk of court, pursuant to the random draw, reassigned it to this Court. Hughes' affidavit concludes, "Judge Aldrich sought and obtained an investigation into the reassignment to Judge Krenzler, apparently suspecting misconduct by court personnel and/or me in the assignment process." It continues that Judge Krenzler retransferred *Reimer* to this Court, which transferred the case to newly appointed Judge Bell within two weeks. A copy of the docket sheet in *Reimer* is attached to the motion.

On this account, the affidavit is totally insufficient. This Court accepts as true the statement that it "caused an investigation" of the reassignment of the case. It finds that a reasonable person would expect any judge to do so.[3] Moreover, the docket sheet does not indicate in any manner that Hughes played any role in the reassignment of the case; in fact, he was merely one of twenty parties to the action. Hughes presents no basis for his belief that this Court "apparently suspect[ed] misconduct by . . . me in the assignment process." The docket sheet indicates only that the practices of the clerk's office were extraordinary and properly the subject of inquiry. This Court was completely satisfied with the resolution of the assignment by Judge Krenzler and Judge Battisti, and it reassigned the case to Judge Bell only because it was a case suitable for distribution to the

[3] Examination of the copy of the docket sheet attached by Hughes reveals that entry number fifty-two had been altered by attempting to "white out" the name of this Court. Prudence dictates at least casual inquiry regarding why such an unusual procedure would be followed by the clerk of court.

docket of a new judge.[4] This Court must find that a reasonable person would not believe it to be prejudiced or biased against Hughes because of abnormalities in the reassignment of the *Reimer* case.

Accordingly, this Court finds Hughes' objections to its perceived impartiality to be meritless. It can only attribute the motion to recuse or disqualify to Hughes' zealous preservation of all possible appeal rights. Defendant is constitutionally entitled to a fair trial on the charges levied against him; he is not entitled to a judge of his choice. *Sinito v. United States*, 750 F.2d 512, 515 (6th Cir. 1984). Hence, this motion for disqualification or recusal must be denied.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge

---

[4] The attached docket sheet for the *Reimer* case establishes that its pleadings had already become voluminous and its complexity apparent at the time it was reassigned to this Court. Typically, this is the sort of case which any deputy clerk will recommend for reassignment to a new judge's docket.

It should also be noted that the docket sheet shows that twelve days elapsed between the reassignment of the *Reimer* case to this Court and its reassignment to Judge Bell, without the filing of a recusal motion by Hughes or any other party.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed November 21, 1986)

No. 88-3997

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

in Re:

MARTIN J. HUGHES,
Petitioner.

ORDER

BEFORE: KEITH, MERRITT and WELLFORD, *Circuit Judges.*

Petitioner Martin J. Hughes applies for a writ of mandamus directing Judge Ann Aldrich of the United States District Court for the Northern District of Ohio to recuse herself in the criminal trial currently pending before her. Petitioner also moves to stay the district court proceedings or to expedite a ruling on his petition. Judge Aldrich has responded.

This Court has expressly ruled that a motion to recuse or disqualify a district judge is not reviewable in an interlocutory appeal or in a mandamus proceeding, but rather is reviewable only from a final judgment adjudicating the case on the merits. *City of Cleveland v. Krupansky,* 619 F.2d 576, 578 (6th Cir.) (per curiam), *cert. denied,* 449 U.S. 234 (1980); *Albert v. United States District Court,* 283 F.2d 61 (6th Cir. 1980).

It is ORDERED that the petition for writ of mandamus and motion for stay are denied.

ENTERED BY ORDER
OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed May 21, 1990)

No. 87-4052/4125/4069

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee
Cross-Appellant,

v.

MARTIN J. HUGHES,
Defendant-Appellant
Cross-Appellee.

In Re:

MARTIN J. HUGHES,
Petitioner.

ORDER

BEFORE: BOGGS and NORRIS, *Circuit Judges;* and ENGEL, *Senior Circuit Judge.*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having

requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT GRANTING MOTION TO STAY ISSUANCE OF MANDATE

(Filed June 12, 1990)

No. 87-4052/4069/4125

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee
Cross-Appellant,

v.

MARTIN J. HUGHES,
Defendant-Appellant
Cross-Appellee.

ORDER

BEFORE: BOGGS and NORRIS, *Circuit Judges;* ENGEL, *Senior Circuit Judge.*

Upon consideration of the motion of the appellant to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari,

It is ORDERED that the motion be and hereby is GRANTED, provided that application for certiorari be effected within thirty (30) days of the date herein. Issuance of the mandate shall then be stayed pending a ruling by the Supreme Court. Denial of certiorari shall result in immediate issuance of the mandate.

Failure to apply for certiorari on a timely basis shall result in issuance of the mandate following the allotted thirty (30) days.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. §1001

§1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

28 U.S.C. §455(a)

§455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. §1254

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

29 U.S.C. §431(b)

§431. Report of labor organizations

* * * * *

(b) Annual financial report; filing; contents

Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—

(1) assets and liabilities at the beginning and end of the fiscal year;

(2) receipts of any kind and the sources thereof;

(3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

(5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangement for repayment; and

(6) other disbursements made by it including the purposes thereof;

all in such categories as the Secretary may prescribe.

29 U.S.C. §431(c)

§431. Report of labor organizations.

* * * * *

(c) Availability of information to members; examination of books, records, and accounts

Every labor organization required to submit a report under this subchapter shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

PAGES 2615-19 OF TRIAL TRANSCRIPT

[2615] THE COURT: Sure.

MR. MESSERMAN: Because one of the things we have to decide is what is admissible of all of those exhibits in light of the Court's—

THE COURT: Oh, yes, that, too.

MR. MESSERMAN: —Court's ruling. So during a lunch—now a short lunch period—we will—

LAW CLERK: The jury was told 2:15.

THE COURT: You have a longer one than you think. There will be some exhibits that I think will not be included I think.

MR. MESSERMAN: We will review that and review this and we will see if there is something we can draft that will address Mr. Siegel's concerns.

MR. SIEGEL: I understand the basic point. I mean we agreed, we alleged the basic point of everything being reported and I have no problems with that.

MR. ROTATORI: That's all we are trying to do with this summary exhibit is to show the jury where the exhibit is that we all agree was reported. That's all we're trying to do with it.

MR. SIEGEL: All right.

MR. MESSERMAN: All right. Then there was a question, I think—

MR. SIEGEL: With Judge White testifying.

[2616] MR. MESSERMAN: Yes.

MR. SIEGEL: Maybe Mr. Stickan should address it because he is more familiar with the facts, but it goes to the question of the scope of cross examination.

THE COURT: Cross examination?

MR. SIEGEL: Cross examination and it obviously gets into somewhat of a sensitive area. It goes back to the affidavit filed in the recusal motion which is before my time in this case.

MR. STICKAN: Your Honor, there apparently—well, there was in fact, made a part of an appendix to a petition for writ of mandamus, and I believe it was filed prior to that, an affidavit completed by Mr. Hughes in support of a motion for recusal. And I think the Court's aware of all these motions. We've already discussed them on the record with them.

THE COURT: Is this the affidavit upon which the recusal motion was based and in which I think Mr. Hughes stated that he had at the request of Senator Glenn moved Judge White's commission through President Carter—

MR. STICKAN: Correct.

THE COURT: —earlier than the others?

MR. SIEGEL: Right. And the question is the fact that—

[2617] THE COURT: What?

MR. SIEGEL: —Mr. Hughes had taken this step to, to the benefit of Judge White, is that something that is given the—

MR. STICKAN: Well, the sensitivity of the area is something that's going beyond.

THE COURT: I think it is. And I will tell you why. Because I think that that is a totally, probably normal kind of political activity and I don't even know why it's a benefit to Judge White unless you want to convince me that it has some benefit to being the chief administrative judge in this district.

(Laughter.)

THE COURT: I've always felt that was a questionable benefit.

And we certainly have no indication that Judge White requested this allusive benefit. We have an affidavit that says Senator Glenn did. And to the extent that there is an indication there which was argued very strenuously by the defendants and was denied by me, I think that you are going to really confuse the jury if it gets into this thing of to Judge White's benefit and to my detriment and Senator Glenn was involved.

And then you have, you are putting before this jury what could be a totally unrealistic I think political [2618] jumble that could very well have an effect on how the jury would deliberate on this case.

I just say on the record here that even if both sides are opposed to what I'm going to say, I just think under Rule 403, I'm exercising my discretion and you have to find some other political favor that—

MR. MESSERMAN: So moved.

THE COURT: —that the defendant may have afforded to Judge White. But I just don't think you should get into the personalities of the senator who testified today and/or the judge who has been presiding on the trial.

MR. SIEGEL: Fine, your Honor.

MR. STICKAN: Okay. Fine.

THE COURT: If you have got something else that you wanted to bring up, but I think that issue is just not—I don't think that there is anything about that motion that has been kept secret from anybody but—

MR. MESSERMAN: Except from the jury.

THE COURT: —the circuit sent it back. The circuit didn't say anything, except to open seals. And I wasn't intending to do that.

But I just would rule I think that there is too much potential prejudice I think in too many directions to really anticipate where it would go.

MR. STICKAN: Okay.,

[2619] THE COURT: I certainly wouldn't want to prejudice the defendant with that. Or that can confuse the jury with who are these people.

MR. STICKAN: We understand, your Honor. Yes. Okay.

MR. ROTATORI: Thank you, your Honor.

THE COURT: I will see if we will have the jury instructions ready so you can have them.

MR. ROTATORI: Good.

(The foregoing proceedings were had in chambers out of the hearing of the jury.)